In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 762

Office Supreme Court, U. S.
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CHARLES ELMORE CROPLEY
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JAMES M. LEAVER, JR., *Petitioner,*

vs.

CITIZENS NATIONAL TRUST AND SAVINGS BANK OF RIVERSIDE, a National Banking Corporation, and DONALD PARKER, as Administrator with the Will Annexed of the Estate of GEORGE D. PARKER, Deceased, FOOD MACHINERY CORPORATION, a Corporation, SIGNODE STEEL STRAPPING COMPANY, a Corporation, PARKER MACHINE WORKS, INC., a Corporation, JOHN D. CRUMMEY and WIRE TIE MACHINERY COMPANY, a Corporation, *Respondents.*

Brief for Respondents In Opposition to Petition for Writ of Certiorari

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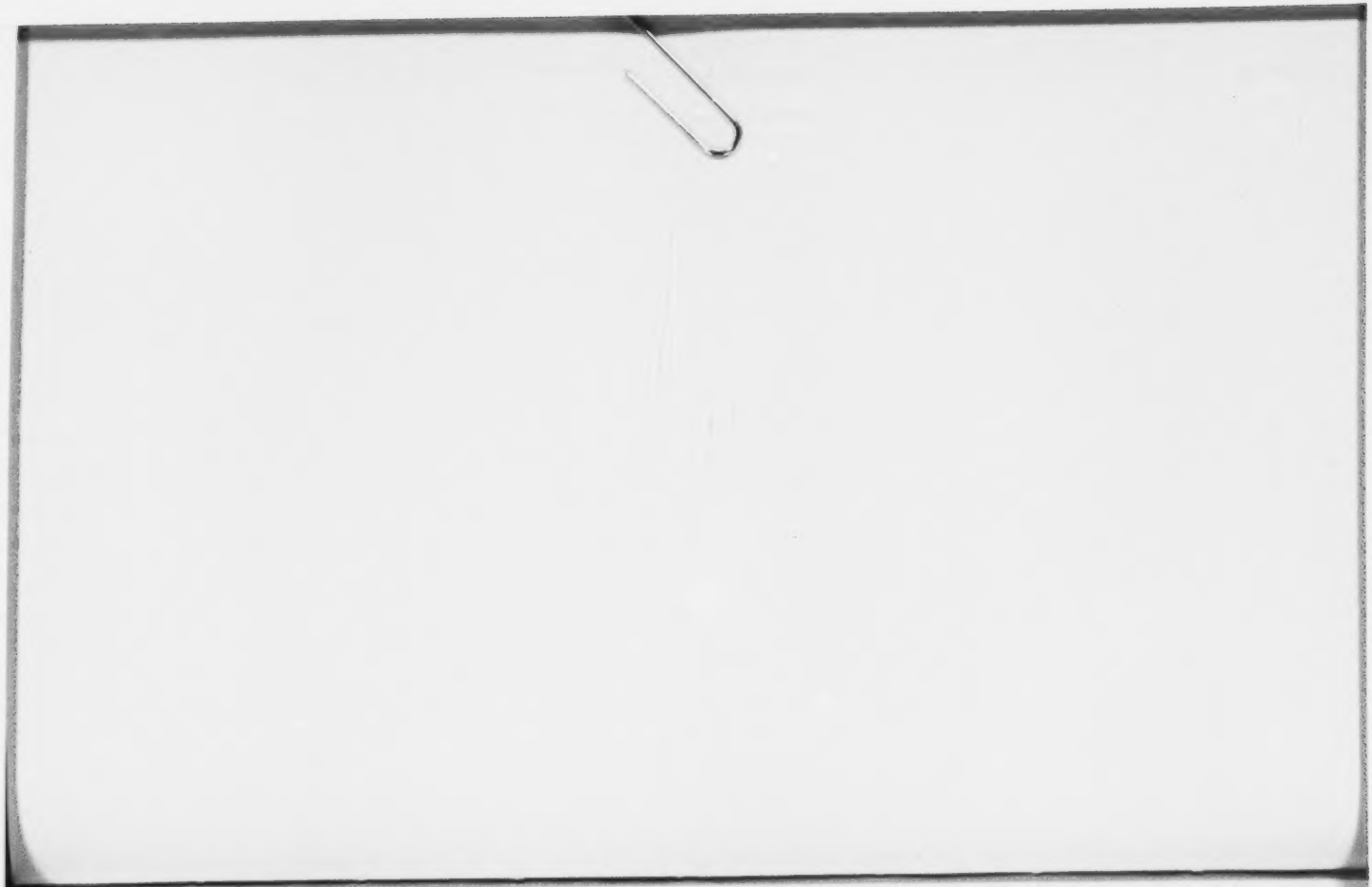

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Respondents.

Brief for Respondents In Opposition to Petition for Writ of Certiorari

INTRODUCTORY

Petitioner sought to invoke the jurisdiction of the Federal District Court upon the ostensible ground that respondents had violated the federal anti-trust and patent laws. In form petitioner undertook to set forth causes of action under federal law, but in substance petitioner was attempting to establish private rights, arising upon contract. Respondents moved for a summary judgment under Rule 56 of the Federal Rules of Civil Procedure, basing

their motions upon a comprehensive record, largely documentary. The District Court granted the motions, and judgment was entered for respondents on the merits.

Petitioner thereupon appealed to the Circuit Court of Appeals, which found that

> "The pleadings and affidavits showed that the action did not arise under the patent laws or the anti-trust laws and did not really and substantially involve any dispute or controversy properly within the jurisdiction of the District Court." (R. 1573)

and that

> "The action arose upon and involved the construction and interpretation of a contract which, among other things, granted a license for the manufacture and sale of machines embodying inventions for which patents had been issued or applied for." (R. 1574)

and that

> "The only controversy which this action really and substantially involved was a controversy as to who were Parker's and Evans' successors in interest. The gravamen of the complaint was that appellees [respondents] and their codefendants had claimed and were claiming to be such successors and had exercised and were exercising rights which the contract had vested in Parker and Evans; whereas, according to the complaint, appellant [petitioner] had succeeded to and was entitled to exercise all of said rights.
>
> Appellant [petitioner] did not challenge the legality or validity of the contract or seek its avoidance. Instead, he relied on it and claimed under it, as did his adversaries." (R. 1575)

The court then concluded:

> "We therefore regard as frivolous appellant's [petitioner's] characterization of his adversaries' acts as patent infringements and violations of the anti-trust laws." (R. 1575)*

Thus the Circuit Court, upon the entire record, found that the only controversy really and substantially involved was over "the construction and interpretation of a contract". (R. 1574) Such a controversy does not present any situation contemplated by Rule 38 of this court.

The petition does not correctly present any question raised by the decision of the Circuit Court; nor does it state any reason properly arising from that decision for granting a writ of certiorari.

According to our view, the issues set forth as "Questions Presented" on page 9 of the petition are wholly unwarranted by the judgment and opinion of the Circuit Court.

The Circuit Court did not hold, as recited in the petition, that the "U. S. District Court is without jurisdiction to inquire into the legality of the conspiracy and acts which have wholly eliminated the party seeking relief from continuing in his established business in interstate commerce, and creating a monopoly in his competitor." Nor did it hold "in effect that the interpretation of a contract incidentally involved in a suit under the anti-trust laws deprives the U. S. District Court

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*Reported in 121 Fed.(2d) 738; opinion printed in full in the appendix hereto.

of jurisdiction, even where the restraint of interstate commerce is admitted, the damage established and the contract itself is pertinent to show the measure of damages and the illegality of the acts of the conspirators." Nor did it hold "that the second cause of action in the complaint for infringement, and in which no violation of a contract is pleaded by petitioner and no relief prayed for thereunder, is an action ex-contractu and not an action in tort under the patent laws of the United States." What the Circuit Court really held was that the only substantial controversy involved the interpretation of a contract under which petitioner was claiming rights and denying rights to the respondents, and under which, on the other hand, the respondents were asserting rights and denying that some of the rights claimed by petitioner were his.

Likewise, petitioner's "Reasons Relied upon for Allowance of Writ" (Petition, pages 9 and 10) are unresponsive to the decision of the Circuit Court. (1) The Circuit Court did not rule "that a combination in restraint of trade can contract against liability under the anti-trust laws". There is nothing in the record remotely suggesting a "contract against liability under the anti-trust laws". (2) Nor did the Circuit Court rule that anyone "can be exempted from application of the anti-trust laws". The ruling was that the controversy between the parties as to their respective rights and interests derived from a contract does not present an issue arising under the anti-trust laws. (3) Nor did the Circuit Court depart from "the accepted and usual course of judicial proceedings". The gratuitous nature of the charges tendered by the petitioner as ostensible violations of the federal stat-

utes is plain upon the record. The Circuit Court concluded of necessity that it was "frivolous" on the petitioner's part to characterize his adversaries' acts as "patent infringements and violations of the anti-trust laws".

STATEMENT

A. The facts show that the controversy arose over conflicting claims under a contract, which the California state courts had already decided.

The controversy between petitioner and respondents stems from a contract entered into on October 19, 1922, between petitioner Leaver, George D. Parker and Charles E. Evans. (R. 54-72) This is the contract as to which the Circuit Court of Appeals said: "Appellant [petitioner] did not challenge the legality or validity of the contract or seek its avoidance. Instead, he relied on it and claimed under it, as did his adversaries." (R. 1575)

Under the terms of this 1922 contract, petitioner granted to Parker the exclusive right to manufacture, or to have manufactured, and to sell automatic wire tying machines (frequently termed "wire-ties") and repair and replacement parts thereof, embodying inventions set forth in patents petitioner then owned or might thereafter own or control. (R. 57, 59, 66) Evans granted similar rights to Parker. (R. 58, 66)

The contract further provided (1) that Parker should receive 25% of cost price as manufacturing profit, (2) that petitioner and Evans might take orders for machines manufactured by Parker and receive a 10% commission

"after the money for said sold machines shall have been received by" Parker, and (3) that the net profit was to be divided 40% to Parker, 40% to petitioner and 20% to Evans. No one disputes petitioner's rights as here set out.

Parker manufactured and sold machines under this 1922 contract until he died in 1930. The contract provided that the rights of each party thereunder should "continue for the benefit of the heir, executor or administrator", except that, upon Parker's death, the manufacturing rights should vest in petitioner and Evans as tenants in common. (R. 70, 71)

Upon Parker's death petitioner refused to recognize the rights of the Parker heirs, as represented by the executrix, Clara B. Parker. He gave written notice that he "would not consent to the conduct of any of said business or any part thereof by Clara B. Parker as such executrix". (R. 13) That difficulty was temporarily solved by a five-year contract made on July 14, 1931, whereby the business was conducted by a so-called "Owners' Committee", on which petitioner, the Parker heirs and Evans (and after Evans' death his heir and executrix) each had a representative or served in person. (R. 14, 16, 83-91)

The death of Evans in 1934 brought another crisis because of petitioner's refusal to recognize the rights of either the Evans' executrix and heir (Mrs. Minnie Amanda Evans) or the Parker heirs. Petitioner gave notice that at the end of the five-year "Owners' Committee" regime (i. e., July 14, 1936) he "would take over the management and control of the business of manufacture and sale of machines and parts". (R. 18, 1336) This demand of peti-

tioner precipitated a suit for declaratory relief brought by Mrs. Evans in the Superior Court of California for Riverside County, in which petitioner and two of the respondents, the Parker estate administrators (Parker's executrix in the meantime having died), were named as defendants.

In that suit petitioner claimed that all rights of manufacture and of sale and control under the 1922 contract had become vested solely in him. (R. 13, 18, 1336) He based his claims then, as in the immediate action, upon the contention that the 1922 contract created a partnership or "joint adventure partnership" and that he, as sole survivor, was possessed of all rights of manufacture, sale and control. (R. 894, 1335-1337, 1352)

The Superior Court decided against petitioner's contentions. It found:

(a) "Under the contract of October 19, 1922, Parker, until his death, owned and had the exclusive right to manufacture and sell all wire-ties and parts referred to in said contract * * *" (R. 1368)

(b) "Upon the death of Parker, the exclusive manufacturing right theretofore owned and had by him under said contract of October 19, 1922, passed to, and vested in Evans and Leaver [petitioner] as tenants in common * * * " (R. 1370)

(c) "Upon his [Parker's] death the exclusive right to sell such machines and parts passed to, and vested jointly in his heirs, subject to the administration of his estate * * *" (R. 1369)

And upon these findings, the Superior Court decreed:

(1) "The right to manufacture said machines and parts is vested in plaintiff [Evans' executrix,

Minnie Amanda Evans], and the heirs of Evans, and in Leaver [petitioner] as tenants in common." (R. 1383)

(2) "The heirs of Parker jointly, subject to the administration of his estate, own and have the exclusive right to sell wire-ties and parts therefor within and throughout the United States of America and its territorial possessions and in foreign countries, except that Leaver [petitioner] and the heirs and executrix of Evans each have the right to take orders for such machines and parts and to have said orders filled by the heirs of Parker and the administrators of his estate, and to receive the selling commissions referred to in the contract of October 19, 1922 on orders so taken." (R. 1382)*

Upon petitioner's appeal this decree was affirmed and became final.

Evans v. Citizens National Trust and Savings Bank et al., 29 Cal. App.(2d) 133, 84 Pac.(2d) 218.

On August 31, 1936, by order of the Superior Court of California for Riverside County, the Parker Estate admin-

*It will be noted that the rights of the parties under the contract, as determined by the declaratory judgment, comprehend the manufacture and sale of both machines "*and parts*". Accordingly petitioner has no standing to complain (Petition, pp. 20, 21) of the sale of parts by those who have succeeded to the sales rights. Petitioner has at no time been precluded from exercising his separate right under the contract to take orders for both machines and parts, clearing such orders through the sales agency created by the contract and as determined in the declaratory judgment.

istrators sold substantially all the estate assets to the Nailer Machinery Company (now respondent Wire Tie Machinery Company). (R. 908) Among those assets was the estate's interest under the 1922 contract. Thereby, through descent and by probate sale under court order, Wire Tie Machinery Company became the owner of the exclusive sales rights for machines and repair and replacement parts which originally had been granted to and exercised by Parker.*

On October 14, 1936 Mrs. Evans entered into an agreement with respondent Parker Machine Works, Inc., whereby, in the exercise of her several right to manufacture or have manufactured, she authorized the latter to manufacture, or to have manufactured in her behalf, machines and repair and replacement parts. (R. 322) Pursuant to this contract Parker Machine Works, Inc. has

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*By express provision of the 1922 contract the exclusive sales rights granted to Parker were to continue after his death for the benefit of his "heir, executor or administrator". (R. 70-71) Petitioner has sought to deprive the Parker heirs of these rights, and has denied the efficacy of their transfer by the probate sale to Wire Tie Machinery Company. The asserted "conspiracy" charged by petitioner is supposed to have had its inception in this probate sale. It is well settled that a simple covenant against assignment does not bar involuntary assignments by operation of law, as by purchases at probate sale. (*California Packing Corp. v. Lopez*, 207 Cal. 600, 603, 279 Pac. 664 (1929); *Francis v. Ferguson*, 246 N.Y. 516, 159 N.E. 416 (1927); *Gazlay v. Williams*, 147 Fed. 678, 682-683 (CCA 6th, 1906) (aff'd. 210 U.S. 41).) Moreover, the order of the California Superior Court confirming the sale of the Parker estate assets is not subject to collateral attack and is of course binding upon the federal courts. (*Newberry v. Wilkinson*, 199 Fed. 673 (CCA 9th, 1912); *Simmons v. Saul*, 138 U.S. 439, 11 S. Ct. 369, 34 L. Ed. 1054 (1891).)

had machines and parts manufactured by respondent Food Machinery Corporation.*

B. Proceedings in District Court.

By his complaint petitioner pleaded that the 1922 contract gave rise to a "joint adventure" of which petitioner is the "sole survivor" and that he, "but for the wrongful acts of the defendants", would "conduct the business of said 'Project' ". (R. 3, 9-10, 23) While petitioner sought to invoke the jurisdiction of the District Court under the federal anti-trust and patent laws, he set forth in his pleading the record of his efforts to seize for himself alone complete control of the business enterprise in which he has in fact a partial interest only. (R. 13, 18, 21) He advanced the same claims as to his rights which he had advanced in the state courts of California. By the prayer of his complaint he sought, *inter alia,* a decree establishing in him the rights which he claimed under the 1922 contract and negativing the rights claimed by respondents under that contract. (R. 159-160) Respondents were charged with allegedly wrongful "acts and things" represented almost entirely by the exercise of the rights which they severally claimed as arising out of the 1922 contract and their resist-

*Petitioner has sought to deprive Mrs. Evans, sole heir of her deceased husband, of her several right of manufacture. (R. 18, 502, 505, 894, 1335-1338) But her right to manufacture was expressly upheld by the declaratory judgment in the California courts. It is settled, moreover, that one who acquires rights by operation of law, e. g., by inheritance, takes such rights discharged of the covenant against assignment. (*Bemis v. Wilder,* 100 Mass. 446 (1868); *In re Prudential Lithograph Co.,* 270 Fed. 469, 472 (CCA 2d, 1920); 2 *Thompson on Real Property,* Section 1403, pp. 536, 537.)

ance to the petitioner's adverse claims of exclusive rights in him.

The respondents moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.* The motions were grounded upon an ample record including

(1) the pleadings, in which were incorporated the contracts upon which petitioner relies;

(2) the judgment roll in the state court declaratory judgment action;

(3) the transcript of the proceedings upon the probate sale of the Parker estate assets;

(4) admissions on file, either in response to interrogatories or to demands for admissions or otherwise made of record.

The record, primarily documentary in character, establishes the material facts beyond dispute. The motions for summary judgment were granted. The District Court made findings and conclusions and entered judgment thereupon. (R. 1437-1488)

C. Decision of the Circuit Court.

Petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit, and, as previously noted, the court concluded, upon the record, that "the action did not arise

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*Rule 56 provides in part that:

"The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

under the patent laws or the anti-trust laws and did not really and substantially involve any dispute or controversy properly within the jurisdiction of the District Court". (R. 1573)

ARGUMENT

I.

THE CIRCUIT COURT CORRECTLY HELD THAT THE RECORD SHOWED THAT THE ACTION DID NOT ARISE UNDER THE PATENT LAWS OR THE ANTI-TRUST LAWS AND DID NOT REALLY AND SUBSTANTIALLY INVOLVE ANY DISPUTE OR CONTROVERSY PROPERLY WITHIN THE JURISDICTION OF THE DISTRICT COURT.

Petitioner, having failed to establish the rights which he claimed under his partnership and survivorship contentions in the California state courts, has sought to relitigate them in the federal courts. He has done so by attempting to frame a complaint charging violation of the anti-trust acts and the patent laws.

(a) This is not a case wherein jurisdiction of the federal courts was or can be determined on pleadings alone. Lack of jurisdiction is established by the record facts and by petitioner's real contentions.

Petitioner confuses the issues. He contends that his complaint charges acts which constitute violations of the anti-trust acts and of the patent laws and argues that the Circuit Court was wrong in directing a dismissal of his complaint upon finding, after consideration of the facts of record, that the case is not within the jurisdiction of the federal courts.

Respondents' motions for summary judgment were not grounded merely on the insufficiency of the complaint. What petitioner has failed to appreciate is that, even though the allegations of his complaint might attempt to present a case within the anti-trust and the patent laws, if the record facts show that the case does not substantially involve either the anti-trust acts or the patent laws, it is not properly within the jurisdiction of the federal courts.

Thus as this court said, through Mr. Justice Brandeis, in *Lambert Run Coal Company v. Baltimore & Ohio Railroad Company,* 258 U.S. 377, 382, 383, 66 L. Ed. 671, 675 (1922):

> "To the situation here presented, cases like *Healy v. Sea Gull Specialty Co.,* 237 U.S. 479, 59 L. ed. 1056, 35 Sup. Ct. Rep. 658, relied upon by appellant, have no application. For while it is true that a plaintiff by his first pleading determines what right he will sue on, and that the defenses, set up either anticipatorily by him or in due course by the defendant, cannot affect the jurisdiction when it depends on that right, yet the plaintiff may not, by alleging a frivolous claim or a fictitious situation, confer upon a court jurisdiction which, as determined by the plaintiff's real cause of action, it has not. *The Fair v. Kohler Die & Specialty Co.* 228 U.S. 22, 25, 57 L. ed. 716, 717; 33 Sup. Ct. Rep. 410."

This case does not present a situation where its jurisdictional status can be determined from the complaint alone. By the record in and prior judgment of the state courts of California, affidavits, admissions, documents volunteered or produced upon demand, and a deposition, sufficient facts were before the District Court to convince that court (1) that there was no material issue of fact (R.

1479), and (2) that respondents were entitled to summary judgment under Rule 56 of the Rules of Civil Procedure. (R. 1437-1488) On appeal the Circuit Court determined that the case did not really and substantially involve any dispute or controversy cognizable under the anti-trust or patent laws. (R. 1571-1575) The Circuit Court, therefore, affirmed the judgment of the District Court that petitioner's complaint should be dismissed; not, however, on the merits of the controversy, but on the ground that the federal courts lacked jurisdiction.

Therefore, the petition could properly present only the question whether the facts before the Circuit Court make it appear that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the federal courts and thus require dismissal pursuant to the mandatory provisions of Section 37 of the Judicial Code. (28 U.S.C. §80)

(b) The real controversy between the parties involves rights arising from a contract. Petitioner's contentions respecting such rights have been finally decided adversely to him by the California state courts.

In substance and in reality, if not in form, petitioner bases his entire case upon the interpretation of the 1922 contract on which he relies as the source of his rights. The gravamen of his cause of action, as the Circuit Court properly concluded, was that respondents had exercised and were exercising rights which petitioner claimed he alone was entitled to exercise. (R. 1575)

This suit is in pursuance of a program which petitioner has persistently followed since 1930 to gain for himself the exclusive control of an enterprise which was born of

the 1922 contract. It evidences the determination of petitioner to exclude the successors in interest of the deceased parties to that contract, and to combat the lawful exercise of their rights.

Petitioner's case is founded upon his contention that the 1922 contract created a partnership or at least a joint adventure whereby, upon the subsequent deaths of Parker and Evans, petitioner, as the last survivor, became possessed of the right of exclusive control of the alleged partnership property both tangible and intangible. Thus it is significant that in his prayer he seeks, *inter alia*, a decree that

> (1) the 1922 license agreement is a contract of partnership;
>
> (2) petitioner as sole survivor is entitled to custody of the books, papers, records and property, and "to direct and manage the business of the partnership without interference by, from or on behalf of the defendants * * *";
>
> (3) Parker's administrators and the Parker heirs "have by reason of their wrongful acts divested themselves of any right or rights under the said contract * * *";
>
> (4) Mrs. Evans has divested herself of her right of manufacture;
>
> (5) the administrators' sale of the Parker Estate assets "did not transfer any interest in licenses granted or patents or applications for letters patent described in the contract * * *". (Complaint, R. 159-160)

On the other hand, respondents' position is that the 1922 contract did not create a partnership or joint adventure

or, in any event, did not provide for the vesting in petitioner alone of rights—particularly the exclusive manufacturing and sales rights and the right of control—which he claims under and by virtue of the contract upon the deaths of Parker and Evans.

The interpretation of the 1922 contract, particularly in respect to the devolution of the rights therein created, was finally decided adversely to petitioner by the courts of the State of California.

(c) The charges of violation of the anti-trust acts and of the patent laws are based primarily upon respondents' refusals to comply with demands made by petitioner in excess of his lawful rights, resistance to petitioner's efforts to "take over the management and control of the business of manufacture and sale of machines and parts" and respondents' exercise of rights which are severally theirs.

Petitioner charges a violation of the anti-trust laws on the ground that respondents have interfered with his right to compete with the enterprise which he helped to create. In fact there has been no such interference. The rights which were secured to petitioner under the 1922 contract have at all times been fully recognized by respondents. Petitioner purports to find a "conspiracy" proceeding from the probate sale of the assets of the Parker estate. (R. 146) He charges a violation of the patent laws on the ground that respondents have infringed patents as to which he, in and by the 1922 contract, granted to Parker exclusive manufacturing and selling rights, with specific provisions for successorship. Such manufacturing rights, under the provisions of the agreement and in conformity with the declaratory judgment in the state courts, passed to petitioner and to Mrs. Evans (sole heir of her deceased husband) as tenants in common, i. e., to be exercised either

jointly or severally. The exclusive selling rights, which were granted to Parker and which continued for the benefit of his heirs, became vested in respondent Wire Tie Machinery Company as purchaser at the probate sale. Petitioner, as heretofore noted, has refused to recognize the rights and interests of respondents as to manufacture and sale, notwithstanding that they have been judicially determined in the California state courts.

Petitioner's accusations of violation of the anti-trust and patent laws are based on allegedly wrongful "acts and things" which may be assigned roughly to two categories, or groups, viz., (1) refusal of certain of the respondents to comply with demands made by petitioner in excess of his actual rights, and (2) actions taken by the several respondents in the exercise of their rights.

In the first of these groups may be placed (a) the refusal of the Parker administrators to comply with petitioner's demand that all of the books, records and manufacturing equipment of the "project" be surrendered to him (R. 19, 20, 155); (b) the resistance of Mrs. Evans and the Parker administrators to the notice given by petitioner, upon the death of Evans, that petitioner proposed to "take over the management and control of the business of manufacture and sale of machines and parts" (R. 18); (c) the refusal of the Signode Company to pay over to petitioner the entire amount of the indebtedness due for machines purchased from the "project" during the term of the Owners' Committee arrangement. (R. 37-38) (Petitioner was legally entitled to but 40% of such indebtedness and the remaining 60% belonged to and was being claimed by Parker's successors and Mrs. Evans.) (R. 1019-1031, 1056-1069)

Matters falling within the second group are illustrated by (a) the administrators' sale of the assets of the Parker estate pursuant to orders and decrees of the probate court, eventuating in the acquisition of the sales rights by respondent Wire Tie Machinery Company (R. 39, 150-151); (b) the manufacture of machines by respondent Food Machinery Company upon orders from Parker Machine Works, Inc., pursuant to the contract between it and Mrs. Evans under her adjudicated manufacturing rights (R. 153-154); (c) the selling and distribution by respondent Signode Company of machines lawfully acquired by it but which petitioner nevertheless charges were sold in the northern district of California contrary to the terms of a contract which petitioner concedes had expired and which he would not extend (Petition, 5); and (d) the leasing by respondent Signode Company of machines, lawfully purchased by it, upon terms providing that the repair and replacement parts and wire used therein be purchased from it. (R. 29-30, 35-36) (The Signode Company had acquired title to the machines by outright purchase, and without any restriction on the right of use. (R. 491, 749) Moreover, petitioner does not allege or show that he is interested in the wire supply business.)

This enumeration is not exhaustive but it is representative and serves to disclose the nature of the "acts and things" which petitioner has assembled and which he tenders as ingredients of a "conspiracy" supposed to have had its inception in the probate sale of the assets of the Parker estate.

It is the characterization of these "acts and things" as patent infringements and violations of the anti-trust laws which the Circuit Court deemed "frivolous".

Plainly the alleged violations of the anti-trust laws and patent laws are grounded upon petitioner's contention that under the contract of 1922 he alone has the right to do what the respondents are severally doing. He charges respondents with violation of the anti-trust laws and patent laws, because they are exercising rights which he says belong exclusively to him,—an exclusiveness which the California state courts finally decided does not belong to him.

Petitioner's difficulties are of his own making. They are due entirely to his unwillingness to abide by the interpretation given to the 1922 contract by the California state courts and to his refusal to recognize the rights of the successors to the other parties to that contract. Petitioner has not been "excluded" from the exercise of any rights which he may justly claim. He has simply failed to secure for himself complete control of a "project" in which he has a partial interest only.

II.

PETITIONER HAS FAILED TO PRESENT A CASE CALLING FOR THE EXERCISE OF THE POWER OF SUPERVISION OF THE SUPREME COURT OF THE UNITED STATES.

The case tendered by the petition does not satisfy any of the criteria customarily observed in the granting of a writ of certiorari. None of the situations contemplated by Rule 38 of this court has been shown to exist.

It is not represented that the decision to which the petition is directed is in conflict with the decision of another Circuit Court.

It does not appear that the Circuit Court has decided "an important question of Federal law which has not been, but should be, settled by this court."

It does not appear that the Circuit Court has decided a federal question "in a way probably in conflict with applicable decisions of this court" or that it has "departed from the accepted and usual course of judicial proceedings."

The petition reveals nothing other than a controversy between petitioner and the respondents respecting the rights and interests derived from a certain contract, and respecting the manner or method of exercising such rights. This is a private controversy, and in all essential respects it had already been determined adversely to petitioner in the state courts of California before the respondents' motions for summary judgment were granted by the District Court.

CONCLUSION

Respondents submit:

1. That none of the purported "Questions Presented" and none of the alleged "Reasons Relied Upon * * *" find the slightest support in the opinion of the Circuit Court.

2. That the only real and substantial issue in the case is one of contract interpretation, which the courts of the State of California have already decided adversely to petitioner's contentions.

3. That the petition raises no issue or question of conflict of decision, or of public concern, or of misunderstanding or misinterpretation of federal law.

4. That the petition should be denied.

Respectfully submitted,

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Dated at San Francisco, California,
December 18, 1941.

APPENDIX FOLLOWS.